YALE LAW JOURNAL

Published monthly during the Academic Year by Yale Law Students
with Advice and Assistance from Members of Faculty

SUBSCRIPTION PRICE, $2.50 A YEAR SINGLE COPIES, 35 CENTS

Canadian subscription price is $3.00 a year; foreign, $3.25 a year.

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THE BROADENED POLICY OF THE JOURNAL.—One year ago the YALE LAW JOURNAL began its second quarter century. At that time it found itself in the midst of a rapidly broadening development in the School of Law. It had been the long established tradition of the school that there was a real and worthy science of jurisprudence and that law must be studied and taught historically, analytically, and comparatively. Especially since the early 'seventies, when the graduate curriculum was definitely organized by Professor Simeon E. Baldwin, the legal systems of Rome and of modern Europe had been continually studied, legal concepts had been analyzed, and the history of legal doctrines and institutions had been investigated. Increased emphasis on these lines of work has, especially in recent years, had an important influence, as regards spirit, method, and content, on the undergraduate as well as graduate courses.

Of necessity, this progress has been reflected in the pages of the JOURNAL. The appreciation received from the alumni of

the school and from legal scholars and practitioners at large encourages still further improvement and development. The present volume will endeavor to foster the science of jurisprudence, to bring home to its readers something of the deeper phases of law and the factors in its growth, to take notice of such defects as may appear in our own system of law as it is actually being applied, and to draw upon other legal systems—past and present—for the means of improvement by legislation and judicial action.

The practice of the law must be recognized as social service and not as a mere means of livelihood. The public is already demanding of the legal profession more than it has been receiving. Soon it will refuse longer to endure the lawyer of no insight into social needs and of smug provincial satisfaction with things as they are. Even the most ignorant man now knows that he is a citizen of the world and not merely of a province. Now is the time for leadership possessing foresight and capacity for reorganization. He only can look far into the future who has seen far into the past. He only can reorganize wisely whose industry has mastered the organizations of others. It is even now the duty of the legal profession—even while our country is in the throes of a war whose end we cannot see but whose successful end we shall achieve—to prepare for a scientific reorganization.

No new or sudden development is contemplated; but earnest effort will be made to publish articles relating to international and comparative law, legislation foreign and domestic, and every aspect of jurisprudence. Doubtless this will mean an increase in the size of each number published; for the JOURNAL will not abate one jot in its efforts to cover the field it has covered in the past, to discuss topics in the traditional branches of our American law, to give a critical review of recent decisions in the courts. Indeed, it is hoped to increase and improve these discussions and to bring about a larger perspective, a greater power of analysis and a wiser criticism because of the broader undertakings already indicated.

The JOURNAL recognizes that legal system is not an end in itself and that jurisprudence is but a sickly plant when cultivated only by Professor Dryasdust. Our sole interest is in the law as it is applied by our courts, as it is made by our legislatures, and as it is a living force among our people. But the understanding of the law in these practical senses requires the deeper investi-

gation and the wider outlook. This fact must be brought home to every practicing lawyer and to every law student. It is believed, moreover, that this can be done most effectively, not by publishing an additional review to be devoted exclusively to the broader lines of legal thought and development, but, by sending forth a well-balanced periodical that participates in all lines of legal research, publishing the results of careful investigation in all branches of legal theory and legal practice. To this end the JOURNAL is dedicated; and it is hoped that the present volume may have some modest degree of success in attaining it.

THE LAW SCHOOL.—The JOURNAL records with satisfaction the addition of four new professors to the Law School Faculty. One of the four, Professor Edmund M. Morgan, formerly of the University of Minnesota faculty, has not yet assumed his duties here, having been given leave of absence to perform war service. He has received a commission as Judge Advocate, with the rank of Major, in the Officers Reserve Corps and has been detailed for service in Washington. On account of Professor Morgan's absence the course in Court Practice which he was to inaugurate will not be given this year.

The three other new professors have taken up their work at Yale. Professor Ernest G. Lorenzen, also called from the University of Minnesota, is to give courses in Sales, Damages, Roman Law and Modern Developments, and the Comparative Conflict of Laws.

Professor Henry W. Dunn, formerly Dean of the University of Iowa Law School, is to give courses in Property I, Property III and Office Practice.

Professor Edwin M. Borchard, formerly Law Librarian of Congress and an Assistant Solicitor of the Department of State, is to give courses in Property II, Administrative Law and International Law. He also has charge of the Law Library.

Professor Wurts is to be away during the coming year on a sabbatical leave of absence.

The registration of students this year is almost exactly fifty per cent. of last year's enrollment.

THE RIGHT OF ALIEN ENEMIES TO SUE IN OUR COURTS

The question of the right of "alien enemies" to sue in municipal courts, which has frequently, since the outbreak of the war, been presented to the English courts, has recently come up for

decision in this country. *Posselt v. D'Espard* (1917, N. J. Ch.) 100 Atl. 893.* Much of the confusion in which the general question has been left by the courts in England and in this country is due to the loose way in which the term "alien enemy" has been used. The connotation of the term varies with the circumstances to which it is applied. With reference to naturalization, it signifies a person having the nationality of an enemy country.[1] With reference to suits for the recovery of property or money damages, it signifies, in the present state of Anglo-American law, a person resident in the territory of the enemy country or adhering to the enemy. This is made apparent by the *purpose* of the rule, inaccurately expressed, that "alien enemies cannot sue in the courts."

The rigorous disabilities imposed upon all aliens by the early English law extended to their suits in court.[2] The privileges conferred upon alien merchants in general ameliorated the harshness of the law, and the alien friend, as distinguished from the alien enemy (subject of an enemy state), was allowed to maintain personal actions. That this right to sue was extended as an incident to the right to trade is shown by Coke's commentary on Littleton:

> "For an alien may trade and traffique, buy and sell, and therefore of necessity he must be of ability to have personall actions; but he cannot maintaine either real or mixt actions."[3]

When we recall that, with the development of international law, England adopted the rule that trading with the "enemy" was prohibited during war,[4] and the further rule that "enemy" character for purposes of trade is determined not by nationality but by "trade domicil" or (in the case of individuals) by voluntary residence in the enemy country,[5] the reason for the rule

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* For complete statement of the facts see page 128, *infra*.

[1] *In re Cimonian* (1915, Ont. S. C.), 23 Dom. L. R. 363.

[2] 1 Pollock & Maitland, *History of English Law*, 461.

[3] *Co. Litt.* (1st Am. ed.), 129 b.

[4] 2 Halleck, *Int. Law* (4th ed.), 143 *et seq.* Trotter, *The Law of Contract during War* (London, 1914), Pt. I, sec. 9; British Trading with the Enemy Act, 1914, 4 and 5 Geo. 5, ch. 87, and Proclamation No. 2, Sept. 9, 1914, and Amendment October 8, 1914. U. S. Trading with the Enemy Act of Oct. 6, 1917, sec. 3 (a). *Horlock v. Beal* [1916] 1 A. C. 486.

[5] *The Pizarro* (1817, U. S.), 2 Wheat. 227, 246; *McConnell v. Hector* (1802, Eng. C. P.), 3 B. & P. 113; *Janson v. Driefontein Cons. Mines* [1902] A. C. 484, 505. *Ingle v. Mannheim Ins. Co.* [1915] 1 K. B. 227.

prohibiting "alien enemies" from suing becomes clearer. The right to sue is in aid of the right to trade, and the prohibitions are, in the main, parallel. The prohibition to trade with any person, firm or corporation resident or doing business in the enemy territory is founded on the principle of public policy "which forbids the doing of any act which will be or may be to the advantage of the enemy state by increasing its capacity for prolonging hostilities in adding to the credit, money or goods or other resources available to individuals in the enemy state."[6]

As a corollary to the above rules, it would seem that there should be no prohibition against suit where there is no prohibition to trade, or where the alien is permitted to continue to reside unmolested. And so, indeed, has the law developed. The state's power of expulsion of subjects of the enemy state has not been frequently exercised in modern times,[7] and in England and the United States, the modern practice, confirmed by treaty,[8] has been to permit peaceable subjects of the enemy to remain, either with express or implied license; a practice which has introduced into the law an exception to the usual procedural disability of the "alien enemy" in favor of those permitted to remain *sub protectione domini regis*.[9]

An examination, in the light of these principles, of the leading cases in which "alien enemies" were non-suited as plaintiffs, discloses that in many of them the alien enemy was a non-resident "alien enemy," generally resident in the enemy state.[10] These are "alien enemies," strictly speaking. In others, the

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2 Westlake, *Int. Law*, 140; 2 Oppenheim, *Int. Law*, sec. 88, 90; *Laurent (Gt. Brit.) v. United States*, Feb. 8, 1853, Moore's Arb., 2671. Japan has also adhered to this criterion of enemy character, but not the countries of continental Europe, which, with minor exceptions in Holland and Spain, adhere to the test of nationality. 3 Fiore, sec. 1432 *et seq.*; 4 Calvo, sec. 1932 *et seq.*; Bonfils, sec. 1343 *et seq.*

[6] Lord Reading in *Porter v. Freudenberg* (C. A.) [1915] 1 K. B. 857, 868. See also Dicey, *Conflict of Laws* (2d ed.) 737.

[7] Borchard, *Diplomatic Protection of Citizens Abroad*, 61 *et seq.*

[8] E. g. Article 23 of Treaty between the United States and Prussia, July 11, 1799, renewed May 1, 1828, 2 Malloy's Treaties, 1494, giving the respective subjects of either state in case of outbreak of war nine months to remove their property, collect their debts, and settle their affairs.

[9] 1 *Bac. Abr.* (ed. 1813) 139, where it is said that the right to sue is consequential on the right to protection.

[10] *Brandon v. Nesbitt* (1794, K. B.) 6 T. R. 23; *Le Bret v. Papillon* (1804, K. B.) 4 East. 502; *Daubigny v. Davallon* (1795, Ex.) 2 Anstruther 462; *O'Mealey v. Wilson* (1808, N. P.) 1 Campb. 482 (a British subject

decision passed off on technical points of pleading.[11] The most important cases involve the right of a resident subject of the enemy state to sue, and in this matter the modern rule dates from *Wells v. Williams* (1698),[12] for in this case the first exception to the disability of the alien enemy plaintiff was introduced. Chief Justice Treby there held that an alien enemy living in England by the King's license and under his protection may sue. Subsequent English cases, while showing some differences of opinion as to the party on whom rested the burden of proof of "license" by the King[13] have, nevertheless, held with practical uniformity that a resident alien, subject of an enemy state, who could show that he was present with the express or implied license of the King could sue.[14] Such a license has been implied, in the cases which have arisen since the beginning of the war, in the system of alien registration created by the Orders in Council under the Aliens Restriction Act, 1914,[15] and has been considered as strengthened rather than weakened by internment of the "alien enemy."[16]

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resident in enemy territory); *In re Wilson* (1915) L. J. K. B., 1893; *Porter v. Freudenberg* (C. A.) [1915] 1 K. B. 857. *Bonneau v. Dinsmore* (1862, N. Y. Sup. Ct.) 23 How. Pr. 397; *Sanderson v. Morgan* (1868) 39 N. Y. 231; *Seymour v. Bailey* (1872) 66 Ill. 288; *Jackson v. Decker* (1814, N. Y. Sup. Ct.) 11 Johns, 418; *Luczycki v. Spanish River Pulp Mills* (1915, Ont. Sup. Ct.) 25 Dom. L. R. 198.

[11] *Derrier v. Arnaud* (1695, K. B.) 4 Mod. 405; *Sylvester's Case* (1702, K. B.) 7 Mod. 150; *Casseres v. Bell* (1799, K. B.) 8 T. R. 166; *Society etc. v. Wheeler* (1814, U. S. C. C., N. H.) 2 Gall. 105; *Hutchinson v. Brock* (1814) 11 Mass. 119; *Levine v. Taylor* (1815) 12 Mass. 8.

[12] 1 Ld. Raym. 282.

[13] Compare *Casseres v. Bell* (1799, K. B.) 8 T. R. 166 with *Boulton v. Dobree* (1808, N. P.) 2 Camp. 163; *Alciator v. Smith* (1812, N. P.) 3 Camp. 245.

[14] See *Boulton v. Dobree, supra; Alciator v. Smith, supra;* and *Alcinous v. Nigreu* (1854, Q. B.) 4 E. & B. 217, where there was a failure to show that the plaintiff was residing in the Kingdom with "the license, safe-conduct, or permission" of the King. See also the recent Ontario case of *Bassi v. Sullivan* (1914, Ont. Sup. Ct.) 18 Dom. L. R. 452.

[15] *Princess Thurn and Taxis v. Moffit* [1915], 1 Ch. 58; *Porter v. Freudenberg* (C. A.) [1915] 1 K. B. 857. Hall, *Int. Law* (6th ed.) 388. Proclamations in Canada, similar to those of England, have been held to remove the procedural disability from alien enemies permitted to remain in residence. *Topay v. Crow's Nest Co.* (1914, B. C. Sup. Ct.) 18 Dom. L. R. 784; *Viola v. MacKenzie, Mann & Co.* (1915, Que. K. B.) 24 Dom. L. R. 208. *Pescovitch v. Western Can. Flour Co.* (1914, Man. K. B.) 18 Dom. L. R. 786.

[16] *Schaffenius v. Goldberg* [1916] 1 K. B. 284.

In the United States, Chief Justice, afterwards Chancellor, Kent, in the leading case of *Clarke v. Morey*,[17] extended the doctrine of *Wells v. Williams* to the conclusion that an alien enemy who comes and resides here, even without a safe conduct or license, is entitled to sue until ordered away by the President; and this, too, although the party is not known by the Government to have his residence in the United States. License is implied from his being suffered to remain. This would seem to be the rule most consistent with enlightened practice.

The English "Trading with the Enemy" proclamation of September 9, 1914 (sec. 3), expressly, and the recently enacted United States "Trading with the Enemy" Act of October 6, 1917 (sec. 2), by implication, exclude from the definition "alien enemy" a person not resident or carrying on business within the territory of the enemy country.

Inasmuch as, in law, the declaration of war makes enemies of all the respective subjects of the belligerents, Vice Chancellor Lane's attempt in the principal case to translate into a legal distinction the political distinction made by the President between the German Government and the German people cannot be supported. It is submitted that the German stockholders, as alien enemies resident in the enemy state, should have been non-suited.

The question as to whether the national character of the American corporation is affected by the majority German stock ownership is discussed in the COMMENT following.

E. M. B.

IS AN AMERICAN CORPORATION SUBSTANTIALLY OWNED BY GERMAN STOCKHOLDERS AN ALIEN ENEMY?

This complex problem was recently submitted to an American court in the case of *Fritz Schultz Jr. Co. v. Raimes & Co.* (1917, N. Y. Sup. Ct.) 166 N. Y. Supp. 567. There is thus raised, at a very early stage of our participation in the Great War, the question adjudicated in England in the celebrated *Daimler* case (*infra*).

There are no internationally accepted rules in existence with respect to the nationality and domicil of corporate bodies. Both concepts, nationality and domicil, can be applied to corporations

[17] (1813, N. Y.) 10 Johns 69.

in a metaphorical sense only.[1] The privileges and duties incidental to allegiance and the "animus" necessary to domicil cannot be ascribed to corporate bodies. Nevertheless, the determination of questions of taxation and jurisdiction with respect to corporations has necessitated adjudications upon the question of their nationality and domicil. In England it has been held that for purposes of the provisions of the income tax law the domicil (more accurately "residence") of a company is at the place where its center of administration, the controlling brain, is located.[2] For purposes of jurisdiction, the "domicil" has been construed to be the place where it has a registered office,[3] and there may indeed be two such "domicils."[4] In the United States, the "fiction theory" of the corporate entity has served to impute to a corporation, for jurisdictional purposes, the citizenship of the

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[1] Foote, *Private International Jurisprudence,* (4th ed.) 143 *et seq.* Volumes have been written, particularly on the continent, on the debatable question of the nationality of corporations. The various theories are well summarized in the work of E. Hilton Young, *Foreign Companies and other Corporations,* Cambridge, 1912, 110-168. See also, Mamelok, *Die juristische Person in internationalen Privatrecht,* Zurich, 1900, 211 *et seq.* Schwandt, *Die deutschen Aktiengesellschaften,* Marburg, 1912, pp. 25-75; Pillet, *Des Personnes Morales en Droit Int. Privé,* Paris, 1914; Isay, *Die Staatsangehörigkeit der juristischen Personen,* Tübingen, 1907, in which the legislative systems of the various countries are outlined (pp. 214-224); Levin, M., *De la nationalité des sociétés et ses effets juridiques,* Paris, 1900, p. 199 *et seq.;* Fromageot, H., *De la double nationalité des individus et des sociétés,* Paris, 1892, pp. 114-121; Lyon-Caen in 12 Clunet (1885) 265-274; Lainé in 20 *Clunet* (1893) 273 *et seq.;* Arminjon in *4 Rev. de droit int.* n. s. (1902) 381 *et seq.,* translated into English by William E. Spear, Clerk, Spanish Treaty Claims Com., Washington, 1907, Document 53; Marais and Barclay in 23rd Report, *International Law Assn.* (1906) 360-372; Jacobi in 27th Rep. *ibid.,* 368-380; Baumgarten in 28th Rep. *ibid.,* 246-254. The various theories relating to the nationality of corporations are summarized in Borchard, *Diplomatic Protection of Citizens Abroad,* 617-618.

[2] *Calcutta Jute Mills v. Nicholson* (1876) 1 Ex. D. 428. *De Beers Cons. Mines v. Howe* (C. A.) [1905] 2 K. B. 612; [1906] A. C. 455. *Goerz v. Bell* [1904] 2 K. B. 136; *Mitchell v. Egyptian Hotels, Ltd.* [1915] A. C. 1022, 1037; *San Paulo Ry. Co. v. Carter* [1896] A. C. 31. See an excellent article by *E. J. Schuster* in (1917) Papers read before the Grotius Society, vol. II, p. 57.

[3] *Keynsham, etc., Co. v. Baker* (1863, Ex.) 2 H. & C. 729.

[4] *Carron Iron Co. v. Maclaren* (1855) 5 H. L. C. 416, 449 and analysis of that case by Prof. Wesley N. Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws* (1910) 10 COLUMBIA L. REV. 319.

state in which it was incorporated,[5] although this conclusion was subsequently rested upon the further fiction that there is merely "an indisputable legal presumption that a state corporation . . . is composed of the citizens of the state which created it."[6]

The persuasiveness and apparent simplicity of the "fiction theory" of the corporation have led the English courts to hold that the nationality of a corporation is to be deemed that of the country in which it was incorporated, regardless of its center of administration,[7] and, most curiously, regardless of the fact that for *belligerent* purposes domicil, and not nationality, is the test of enemy character.[8] Consistently with this theory they have declined to investigate the nationality of the stockholders, as a matter which could not affect the nationality of the corporation.[9] Lord Macnaghten in the *Janson* case (arising out of the Boer war), in which a company incorporated in the Transvaal was largely owned by British stockholders, stated:

> "If all its members had been subjects of the British Crown, the corporation itself would have been none the less a foreign corporation and none the less in regard to this country an alien."[10]

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[5] *Louisville, Cinci., etc., R. R. v. Letson* (1844, U. S.) 2 How. 497, 555. This is the theory followed by Lehman J. in the principal case in deciding that the New Jersey corporation had the right to sue.

[6] *St. Louis and San Francisco Ry. v. James* (1896) 161 U. S. 545, 562.

[7] *Attorney General v. Jewish, etc., Assn.* [1900] 2 Q. B. 556; [1901] 1 Q. B. 123.

[8] *Amorduct Mfg. Co. v. Defries* (1915) 84 L. J. K. B. 586; *Janson v. Driefontein Cons. Mines, Ltd.* [1902] A. C. 484. *Daimler v. Continental Tyre Co.* (C. A.) [1915] 1 K. B. 893. (But see notes 12-14.)

[9] *Janson v. Driefontein Cons. Mines, Ltd.* [1902] A. C. 484; *Amorduct Mfg. Co. v. Defries, supra. The Roumanian* [1915] P. 26. In the matter of ownership of British ships (under the Merchant Shipping Act)—such ships cannot be owned by aliens—the courts until recently adhered to the fiction theory of the corporate entity. *Queen v. Arnaud* (1846) 16 L. J. Q. B. (n. s.) 50. (Lord Denman, C. J.: "In no legal sense are the individual members [of the corporation] the owners.") Recently, however, they have in this matter refused to be bound by the mere incorporation in England as conferring British nationality upon a corporation (and thus upon a ship) substantially owned by alien (German) stockholders, where the ship was under the control of the alien owners. *The Polzeath* [1916] P. 117 (C. A.) 241; *Dictum* in *The Tommi* [1914] P. 251. Compare, in the United States, *Hastings v. Anacortes Packing Co.* (1902) 29 Wash. 224.

[10] *Janson v. Driefontein Cons. Mines, Ltd.* [1902] A. C. 484, 497.

The principle was carried to its logical, if somewhat startling, conclusion by the Court of Appeal in the *Daimler* case,[11] in which Lord Reading held that a company incorporated in England, only one of whose 25,000 shares was owned by a British subject, the balance being owned in Germany, was a British company and entitled to sue in a British court.[12] This decision was reversed in the House of Lords[13] on another ground, so that the opinions of the law lords on the question of the nationality of the plaintiff company are *dicta* only. Nevertheless, they will carry great weight by reason of the authority of the judges delivering them. Of the eight judges, two (Lord Shaw and Lord Parmoor) followed Lord Reading's decision in the Court of Appeal, although Lord Parmoor would, on evidence that the business of the company was carried on in an enemy country, have held otherwise. The Earl of Halsbury took the view that the company had an enemy character if the whole or a large part of its capital were owned by persons residing or doing business in Germany. He was the only one of the fourteen judges who sat in the two appellate courts who, it is submitted, consciously declined to be misled by the fiction theory, but concluded that a corporation was merely a form of association, analogous to a partnership, to enable human beings to do business and enjoy their property.[14]

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[11] *Daimler v. Continental Tyre Co.* (C. A.) [1915] 1 K. B. 893. (Four of the justices concurred, Buckley, L. J., now Lord Wrenbury, alone dissenting on what would seem intuitive rather than legal grounds.)

[12] The decision was substantially aided by the Trading with the Enemy Proclamation of Sept. 9, 1914, which provides (§3) that "In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country." A less restrictive but similar provision is included in the United States Trading with the Enemy Act of October 6, 1917 (§2a). Although the British Proclamation substitutes nationality for domicil in determining enemy character, it is proper to recall that in Anglo-American law the nationality and domicil of corporations are usually considered identical. Subsequent British Orders in Council and the Trading with the Enemy Amendment Act, 1916 (5 and 6 Geo. V, c. 105) have extended the prohibition of trading with the enemy very widely to include those having "enemy association" (which has been construed by the political department of the Government to include firms even in neutral countries having German sympathies, connections or trade relations) and give the Board of Trade wide powers to wind up British concerns with such association. See Frank Evans: Trading with the Enemy Amendment Act, 1916 (1916) 32 LAW QUAR. REV., 249.

[13] [1916] 2 A. C. 307.

[14] An able analysis of the fiction theory of the "corporate entity" showing its true relations to legal realities is to be found in an article by

The opinions of the other judges, as expressed by Lord Parker, while purporting to uphold the legal entity theory, in fact laid particular emphasis upon the actual control and directing center of management as the determining factor in reaching a conclusion as to enemy character; and on this point, while the nationality of the shareholders could not affect the nationality of the company, they considered the character of the stockholders material to the question whether the control of the company's business was in fact vested in persons adhering to or under the control of enemies.[15]

While unwilling to modify in any way the corporate entity theory, Lehman, J., in the principal case, nevertheless adopted so much of Lord Parker's *dictum* as touched upon the question of "control" of the corporation by persons resident in an enemy country or adhering to the enemy, concluding that inasmuch as three of the four directors, including the manager, were residents of this country, the company was not under the "control" of alien enemies.[16] Thus, by the organization of subsidiary companies, with local directors in ostensible control, it would seem possible for large corporations doing an international business, to minimize the effects of an eventual taint of enemy character—a result created by the courts through their hesitation in piercing the corporate veil.

In conclusion, it may be observed that International Claims Commissions have almost uniformly adopted the rule, for purposes of jurisdiction, that the nationality of corporations is that of their country of incorporation, although the Department of

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Professor Wesley N. Hohfeld: Nature of Stockholders' Individual Liability for Corporation Debts (1909) 9 COLUMBIA L. REV. 285, 288 *et seq.* For cases in which the "fiction theory" (under statutory construction) has been discarded see the Australian cases of *Osborne v. The Commonwealth* (1911) 12 Commonw. L. R. 321, 365; and *Morgan v. Deputy Federal Comm.* (1912) 15 Commonw. L. R. 661. A leading extreme case supporting the corporate entity theory is that of *Salomon v. Salomon & Co.* [1897] A. C. 22.

[15] [1916] 2 A. C. 307, 344. Story, J., in the case of *Society etc. v. Wheeler* (1814, U. S. C. C., N. H.) 2 Gall. 105, a case much misunderstood, really decided that the courts could determine the character of the British corporation from the character, enemy or friendly, of its members.

[16] It should be observed that in England, one-third stock ownership in an English company by subjects of the enemy suffices to give the Board of Trade supervision of its affairs, and some similar rule will undoubtedly be adopted by the Alien Property Custodian in the United States. A recent newspaper report mentioned 52% stock membership in Germany as the minimum.

State, acting administratively, always seeks, before extending protection to American corporations abroad, to establish the fact that the substantial beneficial ownership of the company is vested in American stockholders.[17]

CONFLICT OF LAWS IN WORKMEN'S COMPENSATION LEGISLATION.

A recent Connecticut case involves problems in the conflict of laws that are at once of compelling theoretical interest and of great practical importance. An employee under a Massachusetts contract was injured in Connecticut while at work within the scope of his employment. Under the decision of the Supreme Judicial Court of Massachusetts in *Gould's Case*[1], in accordance with the court's conclusion as to legislative intent, the Workmen's Compensation Act of Massachusetts has no application to an injury occurring outside of that jurisdiction. In an action brought in Connecticut recovery was allowed under the statute of the latter state. *Douthwright v. Champlin* (1917) 91 Conn. 524; 100 Atl. 97.

Such a result would have been reached without difficulty under the authority of *Gould's Case, supra.* This case, mainly on considerations applicable to the law of torts generally, while deciding that the Massachusetts act did not apply to extraterritorial injuries, expressly stated that it did apply to all intraterritorial injuries irrespective of the place of the contract. The court gave full effect to the presumption that a legislative act designed partially to supersede a particular branch of the law of torts is coextensive in application with the law thus superseded.[2] The fact that this dominant purpose was effected by reading certain unexpressed terms into certain contracts of employment was deemed not to affect this presumption. The rule of conflict of laws applicable to torts generally,[3] and not that applicable to contracts, was therefore consistently applied.

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[17] Borchard, *op. cit.*, pp. 620-626.

[1] (1913) 215 Mass. 480, 102 N. E. 693. Accord, *Tomalin v. Pearson* [1909] 2 K. B. 61; *Schwartz v. India Rubber, etc. Co.* [1912] 2 K. B. 299. Applying the principle of *Gould's Case* to the question of waiver of common law rights are *Johnson v. Nelson* (1915) 128 Minn. 158, 150 N. W. 620; *Piatt v. Smith* (1915) 188 Mo. App. 584, 176 S. W. 434; *Pendar v. H. & B. Mach. Co.* (1913) 35 R. I. 321, 87 Atl. 1.

[2] *Gould's Case, supra,* 487.

[3] See cases cited in *Gould's Case,* 487; and compare the very important case of *Brown v. Western Union Tel. Co.* (1914) 234 U. S. 542, 547, 34 Sup. Ct. 955, 956.

Such, however, was not the reasoning of the principal case. It had previously been decided[4] that the Compensation Act of Connecticut was in effect an amendment of contract law, in its dominant characteristic a rule of construction applicable to a special class of contracts, whereby certain so-called "implied" terms were added. Accordingly the act was held to apply to all injuries wherever occurring, if arising under Connecticut contracts of employment, with the further intimation[5] that a similar application would be accorded to foreign acts in case of injuries occurring within Connecticut under foreign contracts. This, now probably the prevailing view among the states,[6] while recognized as law by the principal case, was refused application on the ground that the jurisdiction of the contract had, under *Gould's Case,* no applicable compensation act.[7]

We are not now concerned as between the two opposing theories of the workmen's compensation acts. The issue between them is merely one of degree. All rules of contract law, properly speaking, are ultimately concerned with the modification of certain conditions non-contractual in character. Conversely many rules of law, plainly within the domain of tort or quasi-contract law, obtain their compulsory fulfillment through the prohibition of certain terms in certain contracts. In no case is the mere regulation of the contractual relationship as such the sole and ultimate purpose of legislation.[8] In any case a regulation partaking of the nature of tort law *may* involve the incidental modification of the construction of certain contracts.[9] The decisive question should be, therefore: what is the dominant purpose of the statute,—to abolish certain unspecified evils arising from a certain way of contracting, the latter being the direct object of legislative attack, or to remedy certain factual conditions directly selected as the object of remedial legislation, with only an incidental effect upon contract law?

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[4] *Kennerson v. Thames Towboat Co.* (1915) 89 Conn. 367, 94 Atl. 372.

[5] *Ibid.,* 89 Conn. 381, 94 Atl. 378.

[6] *Post v. Burger* (1916) 216 N. Y. 544, 111 N. E. 351; *Schweitzer v. Hamburg-Amerikanische, etc. Co.* (1912, N. Y. Sup. Ct.) 78 Misc. (N. Y.) 448, 138 N. Y. Supp. 944; *Grinnell v. Wilkinson* (1916, R. I.) 98 Atl. 103; *Gooding v. Ott* (1916, W. Va.) 87 S. E. 862. See also Bradbury, *Workingmen's Compensation* (2d ed.) 56.

[7] See principal case, 91 Conn. 528-529, 100 Atl. 98.

[8] E. g., statutes of frauds, and regulations of life insurance contracts.

[9] E. g., regulations of hours of labor.

A graver practical question, however, is here involved. Can a court, consistently with the principles of conflict of laws, presume that an act combines both these characteristics simultaneously? Can it extend its own act to extraterritorial injuries occurring under contracts made within its own jurisdiction, and incorporate by reference foreign acts,[10] if applicable, as a part of the law of the contract in cases of intraterritorial injuries under foreign contracts, on the one hand, and, on the other hand, apply its own act to intraterritorial injuries under foreign contracts when the *lex contractus* has no applicable statute providing compensation, and also give effect to the law of the place of injury irrespective of the law of the contract in the matter of statutory waiver of common law rights of action? No conclusive theoretical objection to such a position exists, as the legislative intention may be deemed to have embraced both objects in equal degree. Such, indeed, has become the settled doctrine of at least one state.[11]

But the principles of conflict of laws are designed to provide a method of selection of specific rules universally applicable to specific groups of facts, without variation dependent upon the place where the remedy is sought.[12] The rule under present consideration must stand or fall according as it, if consistently followed, subserves this end; for, whatever the legislatures might have done by express enactment, they should not be presumed to have acted in contravention of the objects for which rules of conflict of laws exist.[13] We may assume any of the following

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[10] For the logical and legal bases of the conflict of laws, more particularly as regards "incorporation by reference," see Professor Wesley N. Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws* (1909) 9 COL. L. REV. 496, 520, 522, note, and 10 COL. L. REV. 526; see also Comment entitled *Moratorium Decrees and the Conflict of Laws* (1917) 26 YALE LAW JOURNAL, 771, 772.

[11] Except that the tort or quasi-contract aspect of the statute has been carried so far as to embrace intra-territorial injuries, even though the foreign *lex contractus* was an applicable statute. *Am. Radiator Co. v. Rogge* (1914) 86 N. J. L. 436, 92 Atl. 85, 93 Atl. 1083, 94 Atl. 85; *Rounsaville v. Central R. Co.* (1915, Sup. Ct.) 87 N. J. L. 371, 374; Atl. 392, 393 (applying the contract theory). Also compare *Pendar v. H. & B. Mach. Co., supra,* with *Grinnell v. Wilkinson, supra.*

[12] See Pillet, *Essai d'un système général de solution des conflicts des lois* (1894) 21 Clunet 417, 711; also Comment, *Moratorium Decrees and the Conflict of Laws* (1917) 26 YALE LAW JOURNAL, 771, 773.

[13] *In re Wood* (1902) 137 Cal. 129, 69 Pac. 900; *N. Y. Mut. Life Ins. Co. v. Prewitt* (1907) 127 Ky. 399, 105 S. W. 463.

alternative hypotheses, with respect to states X and Y. First, an injury occurs in state X under a Y contract of employment, the injury being of such a nature as to come within the terms of the X statute and not within the terms of the Y statute. Second, the injury comes within the terms of both statutes but with different scales of compensation. Third, state Y has no applicable workmen's compensation act. Fourth, under the law of state Y there has been no waiver of common law rights of action, while under the law of state X there has been such a waiver. Upon the fundamental assumption that the X statute is a branch of the contract law of state X, it necessarily follows that the failure to enact a similar statute in state Y is equally a characteristic of the contract law of the latter state. The absence of an applicable statute, therefore, and the provision of a different scale of compensation, and the rule resulting in no waiver of common law rights are as decisive features of the law of the contract as any positive applicable provision would be. To refuse to give effect to them, by swinging over to the tort theory of the local act, is in direct violation of the principles of international reciprocity applicable to contract law.

If it should be urged that such a policy is in accord with the well-settled rule[14] that the *lex contractus* will not be incorporated by reference when contrary to the declared public policy of the forum, two answers may be made. First, it has been decided,[15] and the result seems incontestable on principle, that contracts made under common law rules of industrial accident liability do not fall within such a classification. Second, the assumption of the existence of such a rule of policy established by the local statute is precisely the position which we contend to be incompatible with the simultaneous assumption that the legislation falls within the category of contract law. It is immaterial that a similar practical result is reached when, as sometimes unavoidably happens, different rules of conflict of laws obtain acceptance in different jurisdictions, or when different notions of public morals require a forum to repudiate a contract valid under the law of the contract. Our suggestions are directed to the fact that the court has in the present instance raised a gratuitous presumption of legislative intention intrinsically leading to this exceptional result.

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[14] *Greenwood v. Curtis* (1810) 6 Mass. 358.

[15] *Reynolds v. Day* (1914) 79 Wash. 499, 140 Pac. 681.

We have seen that a consistent application of the doctrine of the principal case has already produced an actual overlapping of the positive provisions of two compensation statutes.[16] Such a result has not yet been reached under the law of the principal case.[17] It would, however, logically follow from a refusal to recognize the negative features of the law of the contract on a point assumed to be one of contract law.

We submit, therefore, that the decision in the principal case should be reached under the reasoning of Gould's Case, *supra,* or not at all, and that the courts should decisively elect between the theory of that case and the contract theory of the workmen's compensation acts. If the latter prevails, the place of injury should in all cases be immaterial, whether or not the jurisdiction of the contract happens to possess an applicable statute.

C. R. W.

EXTRATERRITORIAL RECOGNITION OF A DECREE OF JUDICIAL SEPARATION

For the first time, apparently, a court has passed upon the extraterritorial effect, in a subsequent action for full divorce, of an *ex parte* judicial separation.[1] *Pettis v. Pettis* (1917) 91 Conn. 608, 101 Atl. 13. Immediately after marriage in New York the parties had separated; the wife remained resident there and obtained the decree in question. When the husband, who was domiciled throughout in Connecticut, began suit for divorce on grounds of desertion she pleaded the decree, which was based on cruelty, to justify her living apart. The court held that a decree of judicial separation, as opposed to full divorce, did not affect the marriage status, was personal in its nature, and to be in any way effective in another State, called for personal jurisdiction over the defendant.

If such a decree from bed and board is indeed personal merely, it cannot of course be enforced abroad against a non-appearing, non-resident party; nor can it be *res judicata* as to the grounds

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[16] See note 11, *supra.*

[17] See principal case, 91 Conn. 528, 100 Atl. 98.

[1] Where *both* parties have been before the court, the decree will bar subsequent suit by the original defendant for divorce on grounds of desertion; and is conclusive as to the issues of fact on which it is based. *Harding v Harding* (1905) 198 U. S. 317, 25 Sup. Ct. R. 679.

on which it was based.[2] Doubt may well be entertained, however, whether such a decree does not sufficiently affect the marriage status to be considered, in the same way as that of divorce proper, a decree *in rem*. This marriage status cannot be literally a *res*, a thing physical; it is rather the condition of the parties in society, the sum of their jural relations with each other and with people at large: their rights, powers, disabilities,[3] etc. Now with judicial separation, as with divorce, the wife loses what disabilities marriage imposed upon her[4]: she may now acquire and hold personal property in her own right[5]; she may convey realty, sue, be sued.[6] The decree may fix her property rights and those of her husband.[7] His control over her and his right of cohabitation he has lost.[8] Has he not then likewise lost his rights against all men that they do not alienate his wife's affections which are no longer his; or interfere with the consortium he no longer enjoys?[9] With the right of cohabitation he has at least lost the duty to support his wife;[10] with this

[2] *Pennoyer v. Neff* (1877) 95 U. S. 714.

[3] When married women's property acts cut away perhaps the major portion of these relations, the *in rem* character of proceedings directed "against" the status grew considerably more shadowy than it was when established in *Ditson v. Ditson* (1856) 4 R. I. 87.

[4] To this an exception ought perhaps to be made as to the power of either party to dispose of real estate acquired before the decree. *Castlebury v. Maynard* (1886) 95 N. C. 281. But see *Marshall v. Baynes* (1892) 88 Va. 1040, 14 S. E. 978.

[5] *Meehan v. Meehan* (1848 N. Y.) 2 Barb. 377.

[6] *Delafield v. Brady* (1888) 108 N. Y. 524, 15 N. E. 428; *Barber v. Barber* (1858 U. S.) 21 How. 582.

[7] See *Davis v. Davis* (1878) 75 N. Y. 221. In *Thompson v. Thompson* (1913) 226 U. S. 551, 33 Sup. Ct. R. 129, a Maryland decree from bed and board was held to blot out the wife's claim to maintenance and her rights in her husband's property.

[8] *People v. Cullen* (1897) 153 N. Y. 629, 635, 636, 47 N. E. 894; and see *American Legion v. Smith* (1889) 45 N. J. Eq. 466, 17 Atl. 770. That cohabitation in the broad sense involves a right as well as a privilege is shown by the remedy granted in case of desertion.

[9] *Barrere v. Barrere* (1819, N. Y.) 4 Johns. Ch. 187, 196, squints in passing toward the persistence of this set of rights. The problem all through here is whether the possibility of reconciliation would be sufficient to found an action; ordinarily such reconciliation would appear not only contingent, but improbable. In any case, the right to compensation for loss of consortium is fading. *Feneff v. R. R. Co.* (1909) 203 Mass. 278; 89 N. E. 436.

[10] Unless it is expressly imposed upon him. *People v. Cullen, supra. Contra, State v. Ellis* (1898) 50 La. Ann. 559; 23 So. R. 445; but the court in the principal case was considering a New York decree.

latter it would seem as if her power to pledge his credit for necessaries must also fall.[11] Further, if no alimony has been decreed, it is not easy to see how the husband's death by the wrongful act of another can any longer found an action by his wife.[12] Even the power to reëstablish the old status must be exercised through a decree of the court;[13] it is hardly to be distinguished from divorcees' powers to remarry each other. The New York judicial separation, in fact, seems to leave very little of the marriage status save a duty in each party not to commit adultery[14] and the incapacity of either to contract a valid marriage with another person;[15] while even this last is matched in the case of the guilty party by like incapacity after full divorce.[16]

Still, though in pure theory we concede to the decree from bed and board an effect *"quasi" in rem,* there are considerations of public policy to be urged against its being so regarded in practice. In the case of divorce *a vinculo,* though constitutional compulsion extends only to decrees obtained in the matrimonial domicile,[17] public policy requires an *ex parte* proceeding at the

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[11] Such power in the wife is decidedly founded on the husband's duty of support; will it stand without its foundation? *Erkenbach v. Erkenbach* (1884) 96 N. Y. 456, 465, suggests that it may still continue.

[12] Statutes confer this right for the purpose of making up to mentioned relatives the entire pecuniary loss resulting from the deceased's death. *Murphy v. N. Y. C. R. R.* (1882) 88 N. Y. 445, basing on the N. Y. Code sec. 1902 ff. But unless the wife be entitled to support, what pecuniary loss does she sustain? It is held, *Countryman v. Fonda etc. R. R. Co.* (1901) 166 N. Y. 201, 208 f., 59 N. E. 822, that the jury may consider prospective damages beyond what they might at common law; would the wife's damage in the supposed case be even prospective?

[13] Bliss' Ann. N. Y. Code sec. 1767.

[14] As shown by the fact that breach of the duty by either would ground a bill by the other for a complete divorce. *Vischer v. Vischer* (1851, N. Y.) 12 Barb. 640.

[15] To these should be added a joint power, legal as well as physical, to produce legitimate children. *Barrere v. Barrere, supra,* indicates a presumption, *prima facie* only, against the legitimacy of children born under such circumstances.

[16] It is worth thought in this connection that this last, this species of "marital celibacy," although decreed by a court having jurisdiction of the person, against one of its own citizens, and although surely intended to affect status, will be given no recognition extraterritorially. *Van Voorhis v. Brintnall* (1881) 86 N. Y. 18; *In re Crane* (1912) 170 Mich. 651, 136 N. W. 587. But *cf. Hall v. Industrial Commission* (1917, Wis.) 162 N. W. 312, discussed p. 131 *infra.*

[17] *Haddock v. Haddock* (1906) 201 U. S. 562, 26 Sup. Ct. R. 525, as interpreted in *Thompson v. Thompson, supra.*

domicile of either spouse to be treated as *in rem.*[18] There is need for certainty in the matters of legitimacy, bigamy, adultery. People are best everywhere married, or everywhere not. There seems to be no such urgent call to recognize in like manner decrees manufacturing states of part- or almost-marriage, distinct each one according to the law of the jurisdiction where its particular decree of limited divorce happened to be granted. Thus in the principal case the court assimilated the parties' status to that nearest like it known to the law of Connecticut: marriage. On the other hand, this use of the judicial separation decree as purely personal leads to difficulty to which the court is sensible: because it did *not* affect status, recognition is denied to a decree which the New York court could not have rendered *ex parte,* had they not held it in some sort *in rem,* precisely because it *did* affect status.[19]

But though we admit it to be so to speak *in rem,* it still does not follow that the decree of judicial separation would have served the purpose for which it was introduced. It was not pleaded in bar; it seems to have been intended to establish against the husband the cruelty on which it was based.[20] But *ex parte* divorce decrees seem to be anomalous—if they are *in rem* in truth—in that they swim free and have effect, though the necessary grounds on which they base sink away; in that they need not even bar further divorce proceedings by the original defendant. So an *ex parte* divorce judgment has been held not to estop the wife from showing that her husband had committed acts entitling her to alimony and divorce, and that *she committed*

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[18] New York and a few other States do not admit this. See *Haddock v. Haddock, supra,* dissenting opinion of Brown, J. And elsewhere limitations are imposed: as, not recognizing jurisdiction in the divorcing court unless the defendant receive actual notice. *Felt v. Felt* (1899) 59 N. J. Eq. 606, 45 Atl. 105; and *cf. Perkins v. Perkins* (1916) 225 Mass. 82, 113 N. E. 841.

[19] To answer that the status concerned is not the same in the two cases; i. e., that a wife's marital status may be affected materially without changing that of her husband, leads into a metaphysical labyrinth. But *cf.* the language in *Haddock v. Haddock, supra;* in *Perkins v. Perkins, supra;* and in the principal case.

[20] Though not included in the pleadings either to the husband's action for desertion or in the wife's cross-action for cruelty, the record was admitted in evidence without objection. The wife's task was to justify leaving her husband on the very day of the wedding; the decree could help in that only so far as it concluded him on the point of cruelty.

none to either bar alimony or ground divorce.[21] And, throwing theory to all the winds of heaven in the interests of justice, courts have, without wishing to "impugn" the prior decree, granted new divorce to an already divorced wife, because without it the ancillary decree of alimony could not be rendered.[22]

Whether, therefore, the *ex parte* decree of judicial separation be, as here held, *in personam* merely,[23]—because it does not in fact affect status, or because it seems more advantageous to act as if it did not; or whether, as fully as divorce *a vinculo*, it finally achieve extraterritorial recognition—in either case the finding of fact on which it is based seems destined, unlike the prophet, to honor only in its own country.

K. N. L.

AN EXPANSION OF THE DUE PROCESS CLAUSE: FEDERAL SUPREME COURT REVIEW OF ERRORS IN THE APPLICATION OF STATE LAWS

Since our Federal Supreme Court, in its interpretation of the due process clause of the fourteenth amendment,[1] is committed to the policy of waiting for cases[2] rather than that of binding itself in advance with a definite rule, each new decision on this subject from that learned body is likely to contain points and reasoning of more than ordinary moment. Three cases recently decided are here to be considered together in so far as their differences will permit.

Mississippi Railroad Commission v. Mobile & Ohio Railroad (1917) 37 Sup. Ct. 602, is a case of attempted railroad regulation which was defeated by the decision of the United States courts. The state commission is an elected branch of the executive department.[3] It held the legally required hearings in this matter, considered the evidence presented by the railroad and others and

[21] *Thurston v. Thurston* (1894) 58 Minn. 279, quoted at length and approved, *Toncray v. Toncray* (1910) 123 Tenn 476, 131 S. W. 977. It is, however, difficult to make out just which marriage relations those are, which the court there holds to have been "seized" by the foreign *ex parte* divorce.

[23] For proceedings *in rem* and *in personam cf.* (1917) 26 YALE LAW JOURNAL 710, 759-764.

[22] *Turner v. Turner* (1870) 44 Ala. 437; *Stilphen v. Stilphen* (1870) 58 Me. 508.

[1] "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

[2] "The process of judicial inclusion and exclusion," *Davidson v. New Orleans* (1877) 96 U. S. 97, 104.

[3] Miss. Code 1906, sec. 4826.

thereafter ordered the reinstatement of numerous local passenger trains recently taken off between Meridian and certain less important points. When the railroad filed a bill to enjoin the enforcement of this order it appeared that under capable management the road was operating at a considerable deficit at that time and further, that some, although not remarkably convenient, service was still offered between the towns. The Supreme Court declared that a fair rate of return must be allowed, otherwise a commission's ruling would be altogether unreasonable and its enforcement a violation of due process. And so it was here.

A second case, *Saunders v. Shaw* (1917) 37 Sup. Ct. 638, probably involves a more novel state of facts. Here a landowner in his suit to enjoin collection of a special drainage assessment levied against him in Louisiana, offered evidence to show that he received no benefit from the improvement. The trial court ruled out this evidence as incompetent but permitted it, as well as some evidence of the defendant drainage board, to be spread upon the record for use by the Supreme Court on appeal. The trial judge did not permit cross-examination, however; and, in view of its ruling which rejected the landowner's evidence, an intervenor, who held bonds payable from this tax, offered no evidence in rebuttal. There was judgment below against the landowner, which was first affirmed by the Supreme Court of Louisiana but on rehearing, on account of a subsequent decision of the United States Supreme Court,[4] was reversed without remanding,[5]—the Louisiana Court probably feeling satisfied of the facts on inspecting those which were before it in the record and only changing position on the point of law, namely, as to whether benefit to the land assessed was material. On the appeal to the United States Supreme Court, the intervenor contended that he had been given no opportunity to present his evidence (since it would have been an idle procedure to attempt to answer that of the landowner which had been rejected by the trial court). In this contention he was upheld; he had not been given due process of law.

A third case also presenting a novel point is *Chicago Life Insurance Company v. Cherry* (1917) 37 Sup. Ct. 492. Two insurance companies being sued in Tennessee but not served there,

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[4] *Myles Salt Co. v. Iberia & St. M. Drainage Dist.* (1915) 239 U. S. 478; 36 Sup. Ct. 204.

[5] *Shaw v. Board of Commrs.* (1916) 138 La. 917, 70 So. 910.

nevertheless contested the jurisdiction of the trial court by a plea in abatement and lost in both the lower and the supreme court of that state, judgment being given for the plaintiff. Suit on the judgment was later brought in Illinois where, in the Superior Court of Cook County, the plaintiff once more had judgment. On appeal the Illinois Appellate Court refused to look further into the question of jurisdiction in Tennessee than to note that the issue had been raised, argued and considered in the courts of that state before judgment was given there.[6] Two lines of reasoning are followed by the United States Supreme Court in affirming the Illinois Appellate Court in this decision.

The first considers the question of jurisdiction in Tennessee as if the case had come up from there without a trip to Illinois. If the Tennessee court did not have personal jurisdiction of the insurance companies it clearly could not issue a valid judgment against them.[7] On the other hand if there had been personal service on the defendants in Tennessee, jurisdiction would of course have been established. There seems to be no well settled rule as to the exact point between these two extreme states of fact at which the line is drawn. The United States Court recognizes that a difference of opinion on the subject is possible and reasonable as well and regards as not lacking in due process a rule that the mere filing of a plea in abatement gives the court jurisdiction.[8]

The second line of reasoning to uphold the Illinois court amounts briefly to this: A decision rendered in good faith by a state court although predicated on a mistake of fact will ordinarily give the defeated party no ground of appeal under the fourteenth amendment of the Federal Constitution. To Illinois courts Tennessee law is a matter of fact and hence the rule applies in this case.[9]

It should be recalled in considering these cases that the meaning of the phrase, "due process of law" has in the United States

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[6] *Cherry v. Chicago Life Ins. Co.* (1914) 190 Ill. App. 70.

[7] *Pennoyer v. Neff* (1877) 95 U. S. 714; *Scott v. McNeal* (1893) 154 U. S. 34, 46; 14 Sup. Ct. 1108, 1112 (administration upon the estate of a supposed decedent).

[8] Equally unobjectionable whether provided by statute or by a court.

[9] Similarly held where a state court is in error on a point of conflict of laws. *Kryger v. Wilson* (1916) 242 U. S. 171, 37 Sup. Ct. 34; see Comment, *Due Process and Full Faith and Credit clauses as applied to the Conflict of Laws* (1917) 26 YALE LAW JOURNAL 405.

been expanded so as to include not only process in the everyday meaning, process-proper, but the result or outcome of that process, the decision or judgment handed down.[10] It should also be recalled that the application of the limitation has been extended to embrace the legislative[11] and judicial departments of our government, including the inferior bodies and officers of each.[12]

The railroad commission in Mississippi was one of these inferior bodies. The case may be classified as one containing a mistake of law and a resulting unreasonable regulation.[13] It may then serve as a background for the others.

The two remaining cases are judicial appeals. Where the act of a court is in question it has been stated upon high authority[14] that an erroneous decision, simply, is not a violation of the due process clause in the fourteenth amendment. That the rule is not applicable to the *quasi* judicial acts of executive bodies is evidenced by the railroad case just considered, there having been no charge of bad faith on the part of the commission. The principal importance of the Louisiana and Illinois cases would seem to consist in showing that the rule is not always and absolutely applicable to judicial decisions either. In other words, they recognize that certain kinds of errors, even by a court relative to its own law, may be denials of due process. One of the cases does this by suggestion; the other seems to decide just that.

For a number of years *dicta,* and to some extent decisions, have been approaching this point from various angles. The progress

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[10] Whether anything turns on the distinction between "process-proper" and result it is difficult to say. A close case may some day bring the distinction into prominence but at present no statement can be made with assurance. See Harlan, J., in *Chicago, B. & Q. R. R. v. Chicago* (1897) 166 U. S. 226, 234-235, 17 Sup. Ct. 581, 584, col. 1.

[11] On the total lack of meaning of the phrase when applied to the legislature without the expanded interpretation, see Cooley, *Constitutional Limitations,* p. 503.

[12] *Ex parte Virginia* (1879) 100 U. S. 339, 346. That the amendment is intended even to cover cases where the state agents act in excess of, or in violation of state law, see, *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 6 Sup. Ct. 1064.

[13] Mistake of law because it appears that the Commission computed railroad service expense on the actual "out of pocket" cost, this rule of computation being held to be wrong.

[14] Chief Justice Waite in *Arrowsmith v. Harmoning* (1886) 118 U. S. 194, 195; 6 Sup. Ct. 1023, 1024. See also, *Patterson v. Colorado* (1907) 205 U. S. 454, 460, 27 Sup. Ct. 556, 557. Cooley, *Constitutional Limitations,* p. 587.

may be set forth as a series of steps. Numerous dicta may be found to the effect that fraudulent decisions or those rendered in bad faith are wanting in due process and may be carried to the United States Supreme Court for that reason.[15] Likewise it has been stated that due process of law requires a competent and impartial tribunal.[16] In one case whose facts were widely aired in the press[17] the dissenting opinion[18] declared that a criminal trial before a mob-controlled tribunal is not due process of law, which general rule seems to have been recognized as well by the majority. A very definite step in this general direction was taken in the case of *Scott v. McNeal*,[19] in which the United States Supreme Court reversed the State Supreme Court of Washington on the question of jurisdiction in a lower court of that state. At that time it is hardly likely that the state court would have been reversed on a question of procedure in the lower court, once the jurisdiction of the latter was established.[20] And yet that is the point to which the decision in *Saunders v. Shaw* now carries us.

This result has been foreshadowed, not only by analogy as outlined above, but directly in the language of the Justices. It has been intimated that extraordinary cases might arise in which a state would deprive a person of due process of law solely by the decision of its courts.[21] Just such an intimation is found in the *Life Insurance* case now before us, but neither therein nor in the previous cases was the required grossly erroneous decision thought to be present. It did arrive when a court rendered a decision which concluded a case without any evidence by one of the parties.

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[15] *Fallbrook Irrig. Dist. v. Bradley* (1896) 164 U. S. 112, 17 Sup. Ct. 56. *Chicago, M. & St. P. Ry. v. Minnesota* (1890) 134 U. S. 418, 466, 10 Sup. Ct. 462.

[16] *Jordan v. Mass.* (1912) 225 U. S. 167, 176, 32 Sup. Ct. 651.

[17] *Frank v. Mangum* (1915) 237 U. S. 309, 35 Sup. Ct. 582.

[18] That of Holmes, J.; Hughes, J., concurred in the dissent.

[19] (1893) 154 U. S. 34, 14 Sup. Ct. 1108.

[20] But it has been urged very forcibly on the ground of this decision and some others, as well as on independent reasoning, that the United States Supreme Court should review all cases in which the state courts are in error concerning their own law. See Professor Henry Schofield, *The Supreme Court of the United States and the Enforcement of State Law by State Courts* (1908) 3 ILL. L. REV. 195.

[21] Dissenting opinion of Holmes, J., in *Raymond v. Chicago, Un. Tr. Co.* (1907) 207 U. S. 20, 28 Sup. Ct. 7, 14.

We have no new rule from these three cases but we do have in one of them a square decision on a disputed question and one from which, in looking forward, we may well inquire how far the Federal Supreme Court will go in future cases involving state court interpretation of state law.

M. S. B.

REVIVING BARRED DEBT AS A FRAUDULENT "INCUMBRANCE" UNDER THE BANKRUPTCY ACT

A recent federal decision holds that the revival by an insolvent debtor just before bankruptcy of a debt barred by the statute of limitations may be treated as an "incumbrance" of the debtor's property, and void as such under section 67e of the Bankruptcy Act. *In re Salmon* (1916, S. D. N. Y.) 239 Fed. 413.[1] In its ordinary meaning, "incumbrance of property" denotes some charge or lien attaching to specific property. To refer to a simple unsecured debt as an incumbrance of property causes considerable linguistic strain. Moreover, under the familiar *ejusdem generis* rule of construction, the term "incumbrances," in conjunction with its accompanying words in section 67e—"all conveyances, transfers, assignments, or incumbrances of his property"—would naturally be confined to the narrower and more usual meaning above suggested. Furthermore, the purpose of section 67e is to invalidate only such transfers as would have been fraudulent at common law or would constitute an act of bankruptcy under section 3 of the Act.[2] The learned judge says that the destruction by the bankrupt of a valid defense against the claimant's debt is analogous to a voluntary conveyance in fraud of creditors. But at common law a transfer of property was not fraudulent as to creditors when the debtor was under a moral obligation to the transferee, though the obligation was legally unenforceable because of some statutory provision.[3] The payment of a barred debt was not deemed a badge of fradu-

[1] For more complete statement of facts, see page 129, *infra*.

[2] *Coder v. Arts* (1908) 213 U. S. 223, 242; 29 Sup. Ct. 436, 444.

[3] Bump, *Fraudulent Conv.* (3d ed.) 223; *Del Valle v. Hyland* (1894, N. Y. Sup. Ct.) 76 Hun. 493 (outlawed debt); *Livermore v. Northrop* (1870) 44 N. Y. 107 (debt within Statute of Frauds); *Wilson v. Russell* (1858) 13 Md. 494 (debt discharged under insolvent laws); *Gardner v. Rowe* (1825, Eng. V. C.) 2 Sim. & St. 346 (transfer to *cestui* of land held on oral trust).

lent intent but a satisfaction of the debtor's moral obligation to pay a creditor, for the statute of limitations is usually considered as merely suspending the creditor's remedy, not as destroying the debtor's obligation.[4] When the statute is waived, the old obligation again becomes effective.[5] The running of the statute creates in the debtor the power of defeating the claim, if he cares to exercise it. This power passes to the trustee in bankruptcy, and cannot, after bankruptcy proceedings have been instituted, be exercised by the debtor.[6] But apart from bankruptcy, the privilege of exercising the power by pleading the statute is personal to the debtor and he is under no duty to exercise it for the benefit of other creditors.[7] Consequently it would seem to follow that creditors cannot object to his releasing or destroying the power by a new promise, actual or implied from part payment. If sound policy forbids the revival of barred debts within four months of bankruptcy, it is believed that further legislation is necessary. The part payment of a barred debt might (as well as reviving the debt) constitute a preference, voidable under section 60b, if the debtor were charged with notice;[8] but it is difficult to see how such a revival can be avoided as a fraudulent incumbrance under sec. 67e. The only other cases found on the point are opposed to the principal case, and would seem to represent the sounder view.[9]

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[4] *Johnson v. Albany & S. R. R. Co.* (1873) 54 N. Y. 416.

[5] *Ilsley v. Jewett* (1841, Mass.) 3 Met. 439.

[6] *In re Zorn & Co.* (1912, E. D. Pa.) 193 Fed. 299.

[7] *Elliot v. Trahern* (1891) 35 W. Va. 634, 643, 14 S. E. 223, 226; see also *Cahill v. Bigelow* (1836, Mass.) 18 Pick. 369, 372 (Statute of Frauds).

[8] See *In re Banks* (1913, N. D. N. Y.) 207 Fed. 662.

[9] *In re Banks, supra; In re Blankenship* (1915, S. D. Cal.) 220 Fed. 395.